Filed 11/30/16 P. v. Howard CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARCELL J. HOWARD, Defendant and Appellant.	B255351 (Los Angeles County Super. Ct. No. BA409472)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Modified and affirmed.

Susan Pochter Stone and Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Marcell Howard appeals from the judgment entered upon his jury convictions of one count of first-degree murder and two counts of attempted premeditated murder. (Pen. Code, §§ 664, 187.)[1] He challenges the sufficiency of the evidence supporting his attempted murder convictions, the jury instructions and prosecutor's closing argument regarding these convictions, and the admission of surveillance evidence. He argues the court and prosecutor incorrectly defined the burden of proof and asserts cumulative prejudice from these errors. We find no reversible error.

Appellant's sentence on the attempted murder counts must be recalculated as 21 years to life for each count. The judgment is modified accordingly and is affirmed as modified.

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[1] Undesignated statutory references are to the Penal Code, unless otherwise indicated.

FACTUAL AND PROCEDURAL SUMMARY

On the evening on March 23, 2013, Alex Theus hosted a birthday party for Arthur Franklin, Jr.[2] There were between 20 and 40 guests in attendance. Appellant was brought to the party by Kenneth Clay, a friend of Theus's. Both appellant and Clay were members of the Hoover gang.

Appellant clashed with guests throughout the evening. Crystalle Reed, Theus's cousin and girlfriend of Arthur's brother Clauzell, repeatedly denied appellant's requests to be included in photographs. Appellant then confronted Arthur's nephew Aaron Johnson, who was wearing an Army fatigue hat, about wearing "a maggot's" hat. "Maggot" is a disparaging term used by Hoover gang members to refer to the Main Street Mafia Crips. After Johnson complained that appellant was "banging" at a family party, Theus separated the two men. Later appellant pulled a chair from under a woman who refused to share her drink with him and got into an argument with Rayvon, the boyfriend of Arthur's sister Artrinity. Theus again diffused the situation.

Eventually Arthur confronted appellant about disrupting his birthday party. Johnson, Clauzell, and Rayvon surrounded the men as they argued. Appellant announced he was "O.G." from Hoover. He repeatedly said he was done talking, or he would not do any talking, which in gang slang was a threat to escalate the conflict. Reed

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[2] Members of the Franklin family will be referred to by first name for purposes of clarity.

asked appellant to leave if he could not calm down. Arthur's cousin, La Quanda Nelson, overheard appellant say he was going to get a gun and return. She was concerned, and before leaving the party told both Arthur and his father to end it.

Less than an hour after he left, appellant returned with a gun and opened fire.[3] Wade Vanzie, a guest who was in the backyard, was shot in the thigh and bled to death due to a severed femoral artery. Reed, Johnson, Artrinity, and Arthur were standing near each other in or next to the doorway or on the back porch of a back room, where guests were dancing.[4] There were at least eight other individuals

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[3] Appellant was identified as the shooter by several eyewitnesses. Clauzell identified appellant from a six-pack, and in court testified that the shooter's height, build, and long-sleeved black shirt were similar to appellant's. Johnson testified he recognized the shooter as appellant by his "deep stare." Theus also identified appellant as the shooter.

[4] The testimony about the precise position of particular individuals was somewhat inconsistent. Clauzell, who was still in the backyard at the time of the shooting, testified he saw Reed and Artrinity on the porch and Arthur in the doorway of the back room. Reed testified she was either on the porch or "in the back room by the door" talking to Arthur, and Artrinity was a few feet further into the room; Reed did not remember seeing Johnson. However, Johnson testified he was in the doorway as well, "standing right in front of [his] auntie[ ] [Ar]trinity and Crystalle." He claimed to have been able to see the shooter in the backyard. Arthur testified that when he heard the shots, he was in the back

inside that room.[5] Appellant fired six or seven shots towards the back room from a distance of approximately 23 feet. Reed was shot in the waist, chest and left arm. Artrinity was struck in the back of the neck. Appellant then ran around to the front of Theus's house. As Theus looked outside, appellant stopped and fired shots in his direction. A total of nine casings were recovered from the scene of the shooting.

Police conducted surveillance on appellant's home and on April 10, 2013 followed his wife's car for three hours. Appellant's wife took a series of evasive actions, such as making abrupt u-turns and lane changes, and sitting in the car in parking lots for extended periods of time. She managed to get away, but the surveillance team soon found her car parked outside her mother's house in Compton. The officers saw appellant come out of the house, look up and down the street, approach the car and look under it before returning to the house.

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room standing up against the far back wall facing the door, but he marked his position in the doorway area.

[5] Arthur estimated there were up to 30 individuals in the back room. However, Reed testified to a more limited number. Six or seven of her girlfriends had come to the party and were in the back room at the time of the shooting, along with another friend of hers, Janai James. A DJ had set a table blocking off the adjoining kitchen. Theus testified that he and several other individuals were in the living room past the kitchen.

Appellant was charged with one count of first degree murder and two counts of attempted premeditated murder. Personal infliction of great bodily injury on the surviving victims and personal firearm use causing great bodily injury and death also were alleged (§§ 12022.7, subd. (a), 12022.53, subd. (d)), as were two prior strike convictions. (§§ 667, 1170.12.) At the jury trial, the defense called appellant's wife, who testified he had been home at the time of the shooting. The defense also called a psychologist, who testified about the unreliability of eyewitness identification.

Appellant was convicted as charged, and the firearm and great bodily injury allegations were found to be true. At a bifurcated trial, the court found the prior strike allegations to be true, and sentenced appellant to an indeterminate term of 190 years, plus an additional determinate term of 10 years (§ 667, subd. (a)(1)). The indeterminate term consisted of 25 years to life for the first degree murder, tripled to 75 years to life under the Three Strikes law, plus 25 years to life for the firearm use. For each of the attempted murder convictions, the court imposed 15 years to life, tripled to 45 years to life under the Three Strikes law. The enhancements as to these counts were stayed. The court imposed fees, fines and assessments.

This appeal followed.

DISCUSSION

I

Appellant argues the evidence does not support his attempted murder convictions, the jury was improperly instructed on the kill zone theory of attempted murder, and the prosecutor confused the kill zone theory with the doctrine of transferred intent. None of these asserted errors was raised in the trial court. Despite respondent's claim that the latter two arguments were forfeited, we reach their merits because of appellant's contentions that his substantial rights were affected or that defense counsel was ineffective for failing to object.

We independently review whether substantial evidence supported giving an instruction. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citation.]" (*People v. Stone* (2009) 46 Cal.4th 131, 136.) "[A] shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 745–746.)

Here, the jury was instructed according to the prosecution's theory that appellant targeted Johnson, whom he had confronted about wearing a "maggot" hat, and that Reed and Artrinity were in the kill zone.[6] Relying on *People v. McCloud* (2012) 211 Cal.App.4th 788 (*McCloud*), appellant posits that the evidence does not support the prosecution's kill zone theory because he fired fewer shots than the total number of individuals estimated to have been in the back room. In *McCloud*, two defendants fired 10 shots into a building packed with over 400 people, and the Court of Appeal concluded that the evidence did not support 46 attempted murder convictions on a kill zone theory. (*Id.* at pp. 799–800; see also *People v. Perez* (2010) 50 Cal.4th 222, 232 [single shot fired into a group of eight individuals did not support eight attempted murder convictions].)

In *McCloud*, *supra*, 211 Cal.App.4th 788, 803, the court acknowledged that "[i]f the evidence supports a reasonable inference that, as a means of killing the primary target, the defendant specifically intended to kill every single person in the area in which the primary target was located," then the jury can draw that inference. Here, the prosecution's theory was not that appellant intended to kill everyone in the back

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[6] In closing argument, the prosecutor argued that appellant had reason to kill Johnson, Reed and Arthur, with each of whom he had had run-ins, but that "Artrinity was not involved in any of these. She just was in the wrong spot at the wrong time in the group that was being showered with gun fire."

room; rather, it was that he targeted Johnson and everyone standing next to him. According to Johnson, the group of people standing in the doorway to the back room consisted of himself, Reed and Artrinity; according to other witnesses, it also may have included Arthur. Appellant relies on Reed's testimony to argue that Artrinity was further inside the dance room and not visible from the backyard. However, Clauzell, who was in the backyard, placed both Reed and Artrinity in the group he could see on the porch leading to the back room.

It is axiomatic that the jury may choose which witnesses and what parts of their testimony to believe. (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191.) The testimony of a single witness may constitute substantial evidence if believed by the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Here, there is substantial evidence that appellant fired six or seven shots into a group of three or four individuals—Johnson, Reed, Artrinity, and possibly Arthur, who were standing on the porch or in the doorway to the back room and were visible from the back yard. Appellant's argument that the number of shots was insufficient to kill everyone in the targeted group is unpersuasive.

Appellant contends the kill zone theory instruction was incorrect because it allowed the jury to convict him of the attempted murder of either Reed or Artrinity without finding that appellant intended to kill that particular victim.

In relevant part, CALCRIM. No. 600, as modified, instructed the jury that "[i]n order to convict the defendant of the attempted murder of Crystalle Reed or Artrinity Franklin, the People must prove that the defendant not only intended to kill Aaron Johnson but also either intended to kill Crystalle Reed or Artrinity Franklin, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether defendant intended to kill Crystalle Reed or Artrinity Franklin or intended to kill Aaron Johnson by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Crystalle Reed or Artrinity Franklin."

"In reviewing a claim that the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. [Citation.] We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. [Citation.]" (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

The challenged portion of the modified instruction is unnecessarily convoluted because it combines separate theories of liability as to two different victims: that appellant specifically targeted each individual victim and that he primarily targeted Johnson but intended to kill everyone in the kill zone. Yet, we disagree with appellant's suggestion that the jurors reasonably could have understood this instruction as directing them to convict appellant of the

attempted murder of Artrinity if they found that appellant intended to kill Johnson and Reed, but not Artrinity.

In another part, CALCRIM No. 600 correctly states that attempted murder requires a step towards killing another person and an intent to kill "that person," not some other person. In response to a juror's question whether the intent to kill "everyone" in the kill zone meant "every single person" in that zone or could be replaced with "anyone," the court confirmed that an intent to kill every person within the zone is required. The court also directed the jury to reread CALCRIM No. 600 in its entirety. In light of the court's explanation and the complete text of the attempted murder instruction, it is unlikely that the jury convicted appellant of attempted murder without finding an intent to kill each particular victim or everyone in the kill zone.

Appellant also complains of the prosecutor's fleeting characterization of the kill zone theory as "similar" to the doctrine of transferred intent. The latter applies to the accidental murder of a bystander, but not to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 331.) The kill zone theory is based on "concurrent, not transferred, intent." (*Ibid*.) The prosecutor acknowledged this when she stated that the shooter must have "the specific and concurrent intent to kill others within the kill zone." Her characterization of the theories of concurrent and transferred intent as "similar" is understandable because under either theory the actual victim is not the primary target. (*Id*. at p. 329–330.) But the prosecutor did not argue

the jury could convict appellant of attempted murder on a theory of transferred intent. It cannot fairly be said that her closing argument likely misled the jury to apply transferred, rather than concurrent, intent in the context of attempted murder.

II

Appellant contends that both the trial court and prosecutor misrepresented the burden of proof. He asks that we review these contentions despite respondent's claim of forfeiture because the asserted errors affect his substantial rights or amount to ineffective assistance of counsel. We shall do so. (See *People v. Centeno* (2014) 60 Cal.4th 659, 674–677 [reviewing prosecutor's mischaracterization of standard of review on claim of ineffective assistance of counsel]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 [court's mischaracterization of standard of proof during voir dire affected appellant's substantial rights].)

During voir dire, the court defined proof beyond a reasonable doubt as "proof that leaves you with an abiding conviction that the charge is true." The court explained that abiding means "last[ing] over time." In an attempt to illustrate the concept of abiding certainty, the court drew an analogy to a marriage proposal: "Oftentimes, I liken it to if you are involved in a romantic relationship and you're contemplating marriage, is it appropriate to pop the $50,000 question when you probably think you have met the right one? No. Okay. You need greater certainty. Okay. You

probably need an abiding conviction, yes, this is the right person, okay?"

Appellant relies on a series of cases that have found equating the prosecutor's burden of proof with everyday decisionmaking in a juror's life "trivializes the reasonable doubt standard" and violates the defendant's due process rights. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35–37 [prosecutor improperly argued jurors use reasonable doubt standard when changing lanes or deciding to marry] (*Nguyen*); see also *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171–1172 [prosecutor improperly analogized juror decisionmaking in criminal case to planning vacations and getting on flights]; *People v. Johnson*, *supra*, 119 Cal.App.4th at pp. 982–983 [during voir dire, court told jurors to make the "'kind of decisions you make every day in your life,'" such as when driving through intersection].)

As the court explained in *Nguyen*, 40 Cal.App.4th 28, 36, the judgment of a reasonable person "in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence" standard. (*Id.* at p. 36, quoting *People v. Brannon* (1873) 47 Cal. 96, 97.) Empirically, "the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all marriages end in divorce. [Citations.]" (*Ibid.*)

The court's illustration of "abiding conviction" in this case differs from the discredited analogies in the cases on which appellant relies because it was not based on an incorrect assumption of how people make everyday decisions. The court did not suggest that people routinely decide to marry only when they are convinced beyond a reasonable doubt; rather, it posited that they should. The court's view that the decision to marry should require the same abiding conviction as that required in deciding a criminal case was not particularly helpful. But it did not lower the standard of proof to preponderance of the evidence because the court stated that an abiding conviction requires more than "probability."

We also are unconvinced that the prosecutor lowered the standard of proof or trivialized the deliberative process. In her rebuttal argument, the prosecutor used a bundle of pencils to demonstrate that the jury should consider the evidence in its totality rather than "in a vacuum separate and apart from the other items of evidence." She posited that each pencil was an item of evidence received during trial, and by itself could be broken "easily with a slight amount of force . . . ." "But if you take additional items of evidence and you add them together, it becomes stronger, it becomes more difficult to break, because they're now bound together as joint items of evidence, and you take another and another and another until we get through all the items of evidence, and now you take the two fists and you grab onto them. At this point it is difficult, if not impossible, to break.

[¶] And that is the totality of the evidence when considered together, and that is what the instructions tell you to do, and that is what your common sense asks you to do. Consider each one of these items of evidence as you listen to the testimony and the arguments."

Appellant compares this visual aid to the one used in *Centeno*, *supra*, 60 Cal.4th 659. To illustrate the beyond a reasonable doubt standard of proof, the prosecutor in *Centeno* used the hypothetical example of a "criminal case" based on an incomplete and incorrect, yet recognizable, map of California. (*Id.* at p. 666.) The use of iconic images, such as the shape of the state California and the Statue of Liberty, already had been condemned in *People v. Otero* (2012) 210 Cal.App.4th 865 and *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 respectively. The court in *Centeno* explained that the use of such images, "unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. These types of images necessarily draw on the jurors' own knowledge rather than on evidence presented at trial. They are immediately recognizable and irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion." (*Id.* at p. 669.)

The prosecutor in *Centeno*, *supra*, 60 Cal.4th 659 argued that the jury must "look at the entire picture, not one piece of evidence, not one witness." (*Id.* at p. 666.) Despite that argument, the hypothetical invited the jurors to jump to

a conclusion before the prosecutor finished presenting all hypothesized evidence. More importantly, the visual aid in the shape of California was not based on any of the evidence offered in the hypothetical and was irrefutable. (*Id.* at p. 670.) Hence, the effect of the hypothetical "whose answer involve[d] a single empirical fact" was to "oversimplify[] and trivialize[e] the deliberative process." (*Id.* at p. 671.)

Unlike the prosecutor in *Centeno*, *supra*, 60 Cal.4th 659, and in the cases it cited, the prosecutor here did not invite the jurors to solve a "simplistic hypothetical case" or "a picture puzzle," or answer "a simple trivia question." (*Id.* at pp. 670–671.) Rather, the prosecutor used the bundle of pencils to illustrate the point that the jurors must look at each piece of evidence actually elicited at trial not in isolation, but in relation to other evidence elicited at trial, and she used the pencils to represent discrete pieces of evidence actually received at trial, which, considered in their totality, bolstered each other. While the analogy was imperfect because it compared the abstract strength of evidence to the physical strength of objects, it did not encourage the jurors to ignore the actual evidence received at trial, jump to conclusions, or rely on matters not in evidence. Rather, the prosecutor focused on the totality of the evidence, consistent with CALCRIM No. 220, which instructed the jury that "[i]n deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial."

To the extent the prosecutor used the bundle of pencils to argue that in its totality the evidence against appellant was strong, and suggested that the jurors' common sense, as well as the jury instructions, would tell them to consider the total evidence, the argument was not impermissible. (See *People v. Boyette* (2002) 29 Cal.4th 381, 437 [permissible to argue that evidence against defendant is strong and jurors should use their common sense]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1240 ["To tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do"].) As the *Centeno* court explained, the use of analogies and diagrams in argument is not categorically prohibited, and the claim of error must be evaluated on a case-by-case basis. (*Centeno*, *supra*, 60 Cal.4th at p. 667; see also *People v. Otero*, *supra*, 210 Cal.App.4th at p. 874, fn. 3 [declining to consider whether demonstrative aids may be used to show how circumstantial evidence works or how evidence can have some convincing force even if flawed].)

Like in *Centeno*, here there was no objection to the prosecutor's rebuttal argument, but unlike in *Centeno*, respondent here does not concede that the case against appellant was close. (See *Centeno*, *supra*, 60 Cal.4th at p. 676–677 [prosecution's case was based largely on testimony of child witness who recanted and refused to answer questions; witness's father also recanted].) The case against appellant was not close because all material witnesses consistently testified about the threats he made

earlier in the evening, and several witnesses identified him as the shooter. While we do not endorse the challenged analogies, we are not convinced that they amount to reversible error, either individually or cumulatively in combination with other claims of error we have rejected. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316.)

III

In supplemental briefing, appellant argues that evidence of his wife's evasive driving while she was under surveillance on April 10, 2013, more than two weeks after the shooting, was improperly admitted to show his own consciousness of guilt. The trial court's decisions on relevance and the application of Evidence Code section 352 are reviewed under the deferential abuse of discretion standard. (*People v. Merriman* (2014) 60 Cal.4th 1, 74.)

Respondent argues that the challenged evidence was relevant to impeach the alibi testimony of appellant's wife, as well as to prove his consciousness of guilt. Appellant objects that the prosecution did not rely on the impeachment value of the evidence at trial. That is incorrect. When initially arguing the relevance of this evidence, the prosecutor indicated that the surveillance of appellant's wife "will be pertinent as to her testimony," as well as to appellant's own evasive conduct, which showed his consciousness of guilt. The court admitted the evidence of the wife's evasive driving as relevant to "consciousness of guilt," without limiting its relevance to appellant's own consciousness of guilt. The defense understood that the

prosecution intended to show that appellant's wife "was in cahoots with" appellant. In closing argument, the prosecutor noted that the results of the surveillance were "significant" to the testimony of appellant's wife. The wife's evasive driving was relevant to impeach her alibi testimony because it tended to show her consciousness of appellant's guilt.

Appellant assumes that his wife's evasive driving was admitted to prove his own consciousness of guilt on the speculative inference that he had told her to drive evasively. But the prosecutor argued the wife's evasive driving during the early portion of the surveillance was relevant to understanding appellant's own evasive conduct at the end of the surveillance—looking up and down the street and under the car, which was found parked in front of his mother-in-law's house in Compton. It was appellant's own evasive conduct that, according to the prosecutor, showed his consciousness of guilt. The wife's evasive driving was relevant not because it gave rise to an inference that appellant had told her to drive in that manner, but because it allowed an inference that, like his wife, appellant was acting evasively when he scanned the street and checked the car.

Even assuming the evidence gives rise to only a speculative inference that appellant's wife took evasive action on his request, rather than on her own accord, there is no reversible error where, as here, the challenged evidence is simply cumulative of other evidence establishing appellant's consciousness of guilt. (See *People v. Houston* (2005) 130

Cal.App.4th 279, 296 "[t]he admission of cumulative evidence, particularly evidence that is tangentially relevant to establishing a defendant's guilt, has been found to be harmless error"]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1016 [error in admitting cumulative evidence harmless beyond reasonable doubt].) Appellant's own actions give rise to an inference that he fled after the shooting and did not return home, but rather was hiding out at his mother-in-law's house.

IV

Appellant argues, and respondent agrees, that his base sentence of 15 years to life on each premeditated attempted murder count, which was tripled to 45 years to life, was incorrect. The penalty for that crime is life imprisonment, with no specified minimum sentence. (§ 664, subd. (a)(1).) Section 3046, subdivision (a)(1) provides that a person sentenced to life imprisonment for a crime that has no specified minimum sentence may not be paroled for seven calendar years. Thus, premeditated attempted murder carries a life sentence with a minimum parole-eligibility period of seven years unless some other provision establishes a greater minimum term. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 97.)

The prosecution's sentencing memorandum did not cite a provision justifying the 15-year minimum term in this case, nor did the court at the sentencing hearing. Such a term may be imposed on proof of a premeditated attempted murder of a peace officer or firefighter engaged in the

performance of his or her duties. (§ 664, subd. (f).) The gang enhancement statute also may extend the minimum parole eligibility term to 15 years. (§ 186.22, subd. (b)(5).) However, neither of these enhancements was charged, nor was the jury asked to make any findings as to them.

As pronounced, the sentence of 15 years to life is unauthorized. We shall order the judgment modified to reflect a sentence of seven years to life, tripled to 21 years to life, for each of the two premeditated attempted murder counts.

DISPOSITION

The judgment is affirmed as modified to reduce appellant's sentence on each of the two attempted murder counts to 21 years to life in prison, resulting in a new indeterminate term of 142 years. The trial court is ordered to prepare a new abstract of judgment reflecting this modification and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J. MANELLA, J.